



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

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W. Tayloe Murphy, Jr.
Secretary of Natural Resources

Robert G. Burnley
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January 10, 2006

Mr. William A. Sorrentino, Jr., P.E.
U.S. Army Corps of Engineers
Norfolk District Technical Services Division
803 Front Street, Fort Norfolk
Norfolk, Virginia 23510-1096

RE: Approval of Use of Virginia Aquatic Resources Trust Fund for Compensatory Mitigation Required under 9 VAC 25-210 *et seq.* for 2006

Dear Mr. Sorrentino:

On behalf of the State Water Control Board (the "Board") and pursuant to Section 62.1-44.15:5D of the Code of Virginia and 9 VAC 25-210-115E, DEQ hereby approves the continued use of the Virginia Aquatic Resources Trust Fund (the "Fund") as an acceptable form of compensatory mitigation for impacts to state waters, including wetlands, permitted under Virginia Water Protection individual and general permits. According to Virginia Code Section 62.1-44.15:5D wetland compensation requirements may be met by "...contributing to a fund that is approved by the Board and is dedicated to achieving no net loss of wetland acreage and functions".

This approval is given in accordance with the requirements set forth in 9 VAC 25-210-115E and after reviewing the *Memorandum of Understanding between The Nature Conservancy and the U.S. Army Corps of Engineers on operation of the Virginia Aquatic Resources Trust Fund* (dated August 18, 1995 and amended December 18, 2003); after reviewing the 2004 Draft Report of fund activities (dated July 17, 2005); after reviewing the 2004 Final Report of fund activities (dated September 30, 2005); after considering information discussed during a meeting between the Corps, DEQ, and The Nature Conservancy (on October 18, 2005); and after considering public comments received during a 30-day public comment period that ended December 1, 2005 (a summary of those comments is attached).

DEQ's approval to use the Fund is conditioned upon the following:

1. **The Corps shall demonstrate, at a minimum, a no net loss policy in terms of wetland or stream acreage and function by adoption of operational goals or objectives for restoration, creation, enhancement, or preservation of wetland or stream acreage and function, as specified in 9 VAC 25-210-115E.**

To address concerns from the public and state and federal resource agencies of whether or not the Fund is achieving no-net-loss of wetland or stream acreage and function, we suggest that the Corps implement an In-Lieu-Fee Project Review Team (ILFPRT), with the Corps and DEQ as co-chairs, to review all proposed wetland and stream projects using Fund expenditures. The following documents should be used by the ILFPRT to guide Fund project review: *Federal Guidance on the Use of In-Lieu-Fee Arrangements of Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act* (dated October 2000); *Norfolk District Corps and Virginia Department of Environmental Quality Recommendations for Wetland Compensatory Mitigation: Including Site Design, Permit Conditions, Performance Criteria, and Monitoring Criteria*; and the Corps' Regulatory Guidance Letter (RGL) 02-02.

2. **The Corps shall provide timely annual reports to the Board detailing contributions received and acreage and type of wetlands or streams restored, created, enhanced, or preserved in each river watershed receiving those contributions, as well as the mitigation credits contributed for each watershed of project impact, as specified in 9 VAC 25-210-115E.**

The 2005 annual report should be received by DEQ by March 31, 2006, and should include, at a minimum, the following information for each 8-digit hydrologic unit code (HUC) within each river watershed: number of projects; acreage and type of wetland or stream impact and compensation by project using the Cowardin classification method; acreage and type of mitigation activity (e.g. restoration, creation, etc.) reported as credits using accepted ratios, consistent with those used for mitigation banks (required by 9 VAC 25-210-115E); contributions received and expenditures made; other partners and their role in the project; and whether a protective instrument (e.g. a conservation easement) has been recorded for each site receiving Fund contributions.

The annual report should include the status of each project receiving Fund expenditures (i.e. planning/design phase, construction phase, monitoring phase, completed/closed-out, remedial actions needed/performed) and the dates of completion for each phase. This information must be clearly distinguished from other reporting information and completed/closed-out acreage and linear footage must be clearly distinguished from incomplete acreage/linear footage.

The annual report should include documentation that tracks Fund contributions in such a manner so that dollars can be retired within three (3) years of their acceptance into the Fund, as specified in the *Memorandum of Understanding between The Nature Conservancy and the U.S. Army Corps of Engineers on operation of the Virginia Aquatic Resources Trust Fund* (dated August 18, 1995 and amended December 18, 2003). Such "retired contributions" should be used for identified projects, purchase of available mitigation bank credits in the appropriate service area, remedial work or corrective

actions on existing sites, or for other work that directly supports the no net loss policy for wetland and stream acreage and function.

The annual report should also account for accrued interest separately from contribution revenues and how/where this accrued interest was spent. Further, if a project is approved using accrued interest money, the project proposal, the project status information, and the annual Fund report should reflect such use of accrued interest money.

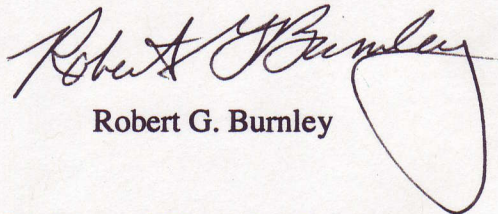
3. **The Corps shall not use the Fund as a compensatory mitigation option in geographic areas having approved mitigation banks with appropriate credits available for purchase unless mitigation provided by the Fund would be preferable in terms of replacement of wetland or stream acreage and function. For this condition, DEQ considers "replacement of wetland or stream acreage and function" to include restoration, creation, and enhancement.**
4. **The Corps shall not allow duplicate mitigation crediting for the same piece of land where the riparian buffer is currently wetlands. Further, no credit shall be given for preservation of riparian buffers on project sites receiving Fund expenditures that are already protected by local ordinances unless there is a documented additional water quality or fish and wildlife resource benefit(s), as specified by 9 VAC 25-210-115E.**
5. **The Corps shall use a fee mechanism ensuring that each contribution is adequate to compensate for the wetland or stream acreage and function lost in the impacted watershed, as specified in 9 VAC 25-210-115E. This fee mechanism should be structured to insure that any approved mitigation banks in the appropriate service area would not be economically disadvantaged by Fund contributions, and the fee mechanism structure should also be capable of adjustments to account for changes in the economy and market forces. Further, the Fund should coordinate with DEQ-Office of Wetlands & Water Protection (Central Office) for input on fee mechanism formulation and any changes.**
6. **The Corps shall consult with DEQ on selection of sites for restoration, creation, enhancement, or preservation, and provide reasonable time-frames (not less than 15 business days) for DEQ's review. This consultation should proceed using the ILFPRT process outlined in Condition #1 above.**
7. **The Corps, as Fund administrator, shall provide monitoring reports to DEQ following a schedule determined by the ILFPRT (see Condition #1 above) for each project site receiving Fund expenditures. Monitoring reports should, at a minimum, include information on the success of restoration, creation, or enhancement activities relative to the project design plans and performance standards for each project site, in accordance with those documents referenced in Condition #1 above.**

Approval of continued use of the Fund by DEQ's Virginia Water Protection Permit Program does not guarantee its use for compensation for a particular project's surface water impacts, including wetlands. Decisions on use of the Fund for a particular project are to be made on a case by case basis after considering the type and location of wetland or stream impacts and all appropriate compensation alternatives. The Board reserves the right to deny use of the Fund

for specific project impacts in watersheds that are not represented by active compensation sites and where approved mitigation bank credits or other compensation options are available.

This approval is granted for a one-year period, and will expire on December 31, 2006. Further approval of the Fund will be based upon meeting the commitments outlined above, including demonstration of no net loss of wetland or stream acreage and function. We look forward to working with your staff and that of The Nature Conservancy on the format and content of the next annual report and on the review of new compensation sites, especially in those watersheds that are currently underrepresented by the Virginia Aquatic Resources Trust Fund.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert G. Burnley", with a large, loopy flourish extending from the end of the signature.

Robert G. Burnley

cc: Ellen Gilinsky, Ph.D.; Director, DEQ Division of Water Quality
Catherine M. Harold, PWS; Manager, DEQ Office of Wetlands & Water Protection
J. Robert Hume, III; Chief, Norfolk District Regulatory Branch